

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 3 of 2007

Vikas A. Rathod .. Petitioner

versus

InteractCRM .. Respondent

...

Ms.Purnima Bhatia for the petitioner

Mr.Jose George for the respondent

CORAM : D.G. KARNIK, J.

DATED : 24th January 2007.

P.C.:

1. Heard counsel for the parties.

2. This petition under section 34 of the Arbitration and Conciliation Act 1996, (for short "the Arbitration Act") is directed against the award dated 12th June 2006 passed by the sole arbitrator.

3. The respondent is engaged in the business of consulting and system integration services i.e. software and systems maintenance of computer networks. The petitioner, who is a software engineer holding a degree in engineering as well as degree in Computer Sciences, was engaged as a technical staff under the respondent, under a written agreement dated 9th August 2004. Clause 3 of the agreement provides that if the petitioner to resign from the service of the respondent while on a project, he would serve on the respondent 60 days advance notice. Clause 4 of the agreement provides that in the event he committed any breach of the terms and conditions of the agreement he would be liable to pay to the respondent liquidated damages amounting to Rs.1,00,000/-. Clause 5 of the agreement provides for reference of any dispute between the parties regarding the agreement or regarding adjudication of any claim or liability to the arbitration of a sole arbitrator to be appointed by the respondent.

4. While working on a project the petitioner, by a letter dated 9th June 2005, resigned from the services of the respondent by giving two weeks

notice. Alleging that the petitioner was required to give 60 days notice under the agreement and resignation by giving two weeks notice amounted to breach of conditions of the agreement, the respondent made a claim of Rs.1,00,000/- in liquidated damages on the petitioner. On failure of the petitioner to pay the liquidated damages as provided in the agreement, the matter was referred for adjudication to the sole arbitration at the hands of Mr.K.P. Sreejith, the sole arbitrator in accordance with clause 5 of the agreement.

5. The petitioner initially appeared before the Arbitral Tribunal and also filed a written statement in defence. However at the hearing, petitioner remained absent and did not adduce any evidence. After considering the evidence adduced by the respondent, the Arbitral Tribunal held that petitioner was liable to pay to the respondent a sum of Rs.1,00,000/- as liquidated damages as provided in the agreement together with interest thereon at Rs.12% p.a. from the date of the breach till payment and costs of arbitration, and passed the award dated 12th June 2006. That award is impugned in this petition under section 34 of the Arbitration Act.

6. Learned counsel for the petitioner raised two grounds of challenges. She firstly submitted that the respondent no.1 had not adduced sufficient evidence of the loss suffered by it on account of the breach. The Arbitral Tribunal, therefore, erred in awarding Rs.1,00,000/- as liquidated damages. In the absence of proof of actual damage, Arbitral Tribunal erred in law the sum specified in the contract as the liquidated damages; it could have only awarded the amount of the actual loss not exceeding the amount of liquidated damages specified in the agreement. She secondly submitted that the Arbitral Tribunal had no power of awarding interest and the award, in so far as it granted interest was bad in law.

7. The question of awarding the liquidated damages specified in the contract without proof of actual damage came up for consideration before the Supreme Court in Oil and Natural Gas Corporation Limited Versus Saw Pipes reported in 2003(5) SCC 705. After considering section 74 of the Contract Act, the Supreme Court in paragraph no.46 of its decision observed as follows :-

"From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss naturally rises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same."
(underlining supplied)

Again while summarising its decision in paragraph nos.68 and 74 of the decision, the Supreme Court held in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can

claim in a suit. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. In some contracts, it would be impossible for the court to ascertain the loss arising from breach and if the compensation contemplated is not by way of a penalty or unreasonable, the court can award the same if it is genuine pre-estimate for the parties as the measure of reasonable compensation. (see sub-para nos.3 and 4 of paragraph no.68 of the decision)

8. Considering the nature of the job of the petitioner in the present case which is of a software engineer engaged in the development and maintenance of software and computer systems, it may be difficult, well nay impossible to prove the actual damage caused on account of the abrupt leaving of the employment by a trained and skilled employee like the petitioner. Liquidated damages of Rs.1,00,000/- cannot, considering the high standards of a software industry and the high salaries paid to the software professionals, of which the court must take a judicial notice, be said to be unreasonable. It can well be said to be reasonable pre-estimation of the

probable loss and in many cases perhaps a fraction of the actual damage and loss caused to a software company by resignation by a skilled employee in breach of the terms of the contract. Again, considering that the petitioner was required to give only two months notice before resigning even while on a project, it cannot be said to be an unreasonable term of the contract. The contention of the petitioner that the respondent was required to prove actual damage and the Arbitral Tribunal could not have awarded the liquidated damages without proof of actual damage has to be rejected.

9. Sub-section (7) of section 31 of the Arbitration Act empowers the Arbitral Tribunal to award, unless otherwise agreed between by the parties, interest at such rate as deemed reasonable whole of any part of the money, for the whole or any part of the period between the date on which cause of action arose and on the date on which award is made. The Arbitral Tribunal has awarded interest from the date of the breach when the cause of action arose @ 12% p.a.. The rate of interest awarded cannot be said to be unreasonable. The contention of the learned counsel for the petitioner that the Arbitral

Tribunal had no power or jurisdiction to award interest from a date earlier than the date of reference has to be rejected in the view of clear provision contained in sub-section 7 of section 31 of the Arbitration Act which empowers the Arbitral Tribunal to award interest from the date of accrual to the cause of action.

10. No other point was urged. In the circumstances, there is no merit in the petition which is hereby dismissed with costs.

(D.G. KARNIK, J)